

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

FILED BY KR D.C.

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ROBERT R. DI TROLIO  
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RICHARD S. COPELAND, on behalf	)	
of himself and all others	)	
similarly situated,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 04-2156 M1/V
	)	
NORTHWEST AIRLINES CORPORATION	)	
and NORTHWEST AIRLINES, INC.,	)	
	)	
Defendants.	)	

ORDER GRANTING IN PART AND DENYING IN PART AS MOOT DEFENDANTS'  
MOTION TO TRANSFER VENUE, TO STAY, OR IN THE ALTERNATIVE, TO  
DISMISS PROCEEDINGS UNDER RULE 12(b)(6)

AND

ORDER DENYING PLAINTIFF'S MOTION TO STAY ALL PROCEEDINGS PENDING  
DECISION ON TRANSFER BY MDL PANEL AS MOOT

Before the Court is Defendants Northwest Airlines Corporation and Northwest Airlines, Inc.'s (collectively "Northwest") Motion to Transfer Venue, to Stay, or in the Alternative, to Dismiss Proceedings Under Rule 12(b)(6), filed March 15, 2004. Plaintiff responded in opposition on April 14, 2004 and July 20, 2004. Also before the Court is Plaintiff's Motion to Stay All Proceedings Pending Decision on Transfer by MDL Panel, filed April 14, 2004. Defendants filed a response on April 29, 2004. For the following reasons, the Court GRANTS in part and DENIES in part as moot Defendants' Motion to Transfer

-1-

Venue, to Stay, or in the Alternative, to Dismiss Proceedings Under Rule 12(b)(6). The Court also DENIES Plaintiff's Motion to Stay All Proceedings Pending Decision on Transfer by MDL Panel as moot.

## **I. Background**

The instant case arises due to Plaintiff's allegation that Northwest unlawfully disclosed personal information to a governmental entity. In December of 2001, the National Aeronautical and Space Administration ("NASA") requested that Northwest provide system-wide passenger data from July through September of 2001, in order to perform research regarding airline security. Northwest, without notifying or obtaining authorization or consent from its customers, subsequently provided to NASA information from its Airline Passenger and Reservation database, which contained personal data about individuals who had flown on Northwest between July and December of 2001. In particular, the information provided to NASA included the individuals' names, addresses, telephone numbers, credit card numbers, and information regarding their itineraries.

Plaintiff filed a class action complaint in the Circuit Court of Shelby County, Tennessee for the Thirtieth Judicial District at Memphis on February 2, 2004. Northwest filed a Notice of Removal to this Court on March 8, 2004.

Eight similar class actions have been filed in federal

district courts nationwide. Seven of those actions were filed in Minnesota and were subsequently consolidated into a master case, In re Northwest Airlines Privacy Litig., No. Civ. 04-126(PAM/JSM), 2004 WL 1278459 (D. Minn. June 6, 2004). The remaining action was filed in North Dakota. Dyer v. Northwest Airlines Corp.'s, 334 F.Supp.2d 1196 (D. N.D. 2004).

## **II. Standard of Review**

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss the plaintiff's complaint "for failure to state a claim upon which relief can be granted." When considering a 12(b)(6) motion to dismiss, a court must treat all of the well-pleaded allegations of the complaint as true, Saylor v. Parker Seal Co., 975 F.2d 252, 254 (6th Cir. 1992), and must construe all of the allegations in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

## **III. Analysis**

Plaintiff alleges that Northwest violated the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. §§ 2702(a)(1) and (a)(3), the Tennessee Consumer Protection Act ("TCPA"), Tennessee Code Annotated § 47-18-101 et seq., "and to the extent

applicable, substantially similar laws of other states." (Pl.'s Compl. at 9.)

As an initial matter, the Court addresses Plaintiff's motion to stay all proceedings pending a decision by the Judicial Panel on Multidistrict Litigation ("MDL") on Plaintiff's motion for centralization with the eight similar actions filed in other federal courts. On September 21, 2004, the MDL panel issued an order deeming Plaintiff's motion moot because the seven Minnesota class actions and the North Dakota class action had been dismissed. In re Northwest Airlines Corp. Privacy Litig., No. 1618 (J.P.M.L. Sept. 21, 2004) Accordingly, the Court DENIES Plaintiff's motion as moot.

The Court next addresses Defendants' motion to dismiss the proceedings pursuant to Federal Rule of Civil Procedure 12(b)(6).

**A. Electronic Communications Privacy Act**

Section 2702 of the ECPA regulates the disclosure of customer communications or records. The ECPA provides that a person or entity providing an electronic communication service to the public:

(1) ... shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and ...

....

(3) ... shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any

governmental entity.

18 U.S.C. §§ 2702(a)(1) and (a)(3). An "electronic communication service" is defined under the ECPA as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15).

Northwest contends that Plaintiff fails to state a claim under the ECPA because it does not provide an "electronic communication service."<sup>1</sup> Numerous Courts have found that the term "electronic communication service" refers to entities that provide internet access to customers, such as internet service providers ("ISP's"), as opposed to merchants and businesses that sell their products or services over the internet. Dyer v. Northwest Airlines Corp.'s, 334 F.Supp.2d 1196, 1198-99 (D. N.D. 2004).<sup>2</sup> Although the United States Court of Appeals for the

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<sup>1</sup> Plaintiff originally alleged that Northwest's course of conduct violated 18 U.S.C. §§ 2702(a)(1) and (a)(3). Plaintiff has since conceded that no claim exists against Northwest under 18 U.S.C. § 2702(a)(1). (Pl.'s Resp. to Defs.' Mot. to Transfer Venue, to Stay, or in the Alternative, to Dismiss Proceedings Under Rule 12(b)(6) (Docket No. 19) at 6.)

<sup>2</sup> See also In re Northwest Airlines Privacy Litig., No. Civ. 04-126(PAM/JSM), 2004 WL 1278459, at \*2 (D. Minn. June 6, 2004) (finding Northwest not an "electronic communication service" provider and stating that "[d]efining electronic communications service to include online merchants or service providers like Northwest stretches the ECPA too far"); In re Doubleclick Inc., Privacy Litig., 154 F.Supp.2d 497, 511 n. 20 (S.D.N.Y. 2001) (stating that examples of "electronic communication service" providers "include ISPs such as America Online, Juno and UUNET, as well as, perhaps, the telecommunications companies whose cables and phone lines carry the traffic"); Crowley v.  
(continued...)

Sixth Circuit has not yet addressed this question, the Court finds the reasoning of those Courts that have found the ECPA not to apply to businesses selling their products and services over the internet persuasive. Northwest is not an internet service provider. Rather, Northwest is an airline that sells its customers airline tickets over the internet. Northwest is therefore not a provider of an "electronic communication service" under the ECPA. Accordingly, the Court finds that Plaintiff fails to state a claim under 18 U.S.C. § 2702(a)(3). See Dyer, 334 F.Supp.2d at 1199; In re Northwest Airlines Privacy Litig., 2004 WL 1278459 at \*2.

#### **B. Tennessee Consumer Protection Act**

Northwest contends that Plaintiff's TCPA claims are preempted by the Airline Deregulation Act ("ADA"), 49 U.S.C. 41713. The determination of whether a state law is preempted is ultimately a question of statutory intent. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992). The preemption

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Cybersource Corp., 166 F.Supp.2d 1263, 1270 (N.D. Cal. 2001) (finding Amazon.com not a provider of "electronic communication service"); Andersen Consulting LLP v. UOP, 991 F.Supp. 1041, 1043 (N.D. Ill. 1998) (finding business with internal e-mail system available for communicating with third parties not a provider of "electronic communication service" because business did not independently provide internet services); But see United States v. Mullins, 992 F.2d 1472, 1478 (9th Cir. 1993) (finding American Airlines, through its computerized travel reservations system accessed through computer terminals by travel agents, was a provider of an "electronic communication service").

analysis therefore begins "with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Id. (quoting FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990) (internal quotation marks omitted); Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985)).

Section 41713(b)(1) of the ADA provides that "a State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier...." 49 U.S.C. § 41713(b)(1). The Supreme Court has stated that the phrase "relating to" in the ADA preemption clause expresses "a broad pre-emptive purpose" and construed the phrase to mean that "[s]tate enforcement actions having a connection with or reference to airline 'rates, routes, or services' are pre-empted under [the ADA]." Morales, 504 U.S. at 383-84.

Furthermore, the Supreme Court has held that the ADA preemption clause "bars state-imposed regulation of air carriers...." American Airlines, Inc. v. Wolens, 513 U.S. 219, 222 (1995). In particular, the Court in Wolens noted "the potential for intrusive regulation of airline business practices inherent in state consumer protection legislation," in concluding that the ADA preempted claims brought against an airline under the Illinois Consumer Fraud and Deceptive Business Practices Act.

Id. at 227-28; See also Fed. Express Corp. v. United States Postal Serv., 55 F.Supp.2d 813, 817 (W.D. Tenn. 1999) (finding that, for the purpose of ADA preemption, the TCPA constitutes state consumer protection legislation).

Plaintiff alleges in his Complaint that Northwest violated the TCPA by disclosing personal information to NASA.<sup>3</sup>

Plaintiff's TCPA claims, however, relate to Northwest's services as an air carrier.<sup>4</sup> Therefore, the Court finds that Plaintiff's TCPA claims against Northwest are preempted by the ADA. See In re Northwest Privacy Litigation, 2004 WL 1278459 at \*4 (holding that similar claims brought against Northwest under the Minnesota Deceptive Trade Practices Act were preempted by the ADA).

The Court therefore GRANTS Defendants' motion to dismiss Plaintiff's claims brought under the Electronic Communications Privacy Act and the Tennessee Consumer Protection Act. Because the Court has dismissed all of Plaintiff's claims, Defendants' Motions to Transfer Venue and to Stay are DENIED as moot.

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<sup>3</sup> As previously noted, Plaintiff alleges in his Complaint that he is entitled to relief under the laws of other states that are substantially similar to the Tennessee Consumer Protection Act, to the extent they are applicable. Plaintiff, however, has not specifically identified any laws of other states substantially similar to the TCPA which Defendants purportedly violated. Moreover, under Morales and Wolens, any such claims would be preempted by the ADA. Accordingly, Plaintiff's claims regarding other states' laws are likewise dismissed.

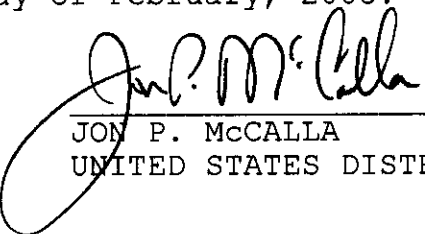
<sup>4</sup> Moreover, Plaintiff has asserted no reason why its TCPA claims are not preempted by the ADA.



#### **IV. Conclusion**

For the foregoing reasons, the Court GRANTS in part and DENIES in part as moot Defendants' Motion to Transfer Venue, to Stay, or in the Alternative, to Dismiss Proceedings Under Rule 12(b)(6). The Court DENIES Plaintiff's Motion to Stay All Proceedings Pending Decision to Transfer by MDL Panel. The Court accordingly DISMISSES all of Plaintiff's claims against the Defendants.

So ORDERED this 28 day of February, 2005.

  
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JON P. McCALLA  
UNITED STATES DISTRICT JUDGE



## Notice of Distribution

This notice confirms a copy of the document docketed as number 45 in case 2:04-CV-02156 was distributed by fax, mail, or direct printing on March 1, 2005 to the parties listed.

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